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Robert Alilovic

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## CONSULTATIONS UNDER THE WTO'S DISPUTE SETTLEMENT SYSTEM

ROBERT ALILOVIC

### I. INTRODUCTION

The creation of the Understanding on Rules and Procedures Governing the Settlement of Disputes<sup>1</sup> (DSU) has heralded a new approach to dispute resolution in international trade law. A majority of the Members of the World Trade Organization (WTO) have welcomed the advent of a more adjudicative dispute settlement system. The system is one that incorporates a clear set of rules, set within a limited time frame, with a panel and appellate structure which not only sets forth binding decisions but which also, through the Dispute Settlement Body (DSB)<sup>2</sup>, oversees the implementation of those decisions. Under the DSU, Member states that have a grievance against another Member for perceived unjust trade practices may present their claim to an adjudicative panel.<sup>3</sup> This panel, consisting of impartial, well-qualified individuals, conducts a formal hearing and presents a binding decision that is automatically adopted, unless the DSB decides by consensus not to adopt the report.<sup>4</sup> If a Member to the dispute believes that the panel erred on an issue of law, it may seek to have the Appellate Body review the panel's ruling.<sup>5</sup>

Despite the incorporation of a binding legal process, the WTO is a creation of international relations, where dialogue and conciliation have always played a key, if not vital, role in the resolution of disputes. Prior to reaching the panel stage, the DSU has set up rules and procedures, under Article 4, whereby Members must engage in consultations in

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<sup>1</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, (1994) 33 I.L.M. at 1226 [hereinafter DSU].

<sup>2</sup> *Ibid.* art. 2.1, 2.4. The DSB is the administrator of the DSU.

<sup>3</sup> *Ibid.* art. 6.

<sup>4</sup> *Ibid.* art. 11- art. 16.

<sup>5</sup> *Ibid.* art. 17.

order to attempt to resolve their differences amicably. Although the parties may request that the organisation provide assistance in the form of mediation, the negotiations customarily involve the disputants exclusively. Should these consultations fail to produce a mutually agreeable settlement, the judicial mechanism of the DSU commences with the formal panel hearing. Thus, even within the legal-oriented rules of the DSU, the importance of negotiations between states is apparent. Unfortunately, many would gloss over the negotiation phase as a relatively inconsequential prelude to the adjudicative panels, thereby ignoring the benefit that a mutually agreed upon solution retains over an imposed decision.

The aim of this paper is to demonstrate that consultations remain a vital element of the WTO's dispute settlement process. The study begins with a brief look at consultations under the General Agreement on Tariffs and Trade<sup>6</sup> and the procedural difficulties which were inherent in its dispute resolution system. In order to discern how the system currently operates, it is important to understand how conflicts were resolved where no *binding* panel system loomed to threaten reprisals should talks fail.

Next, the paper discusses the DSU rules detailing the procedures and the scope of consultations, as well as the rights and duties of the complainant and respondent. Examination of the rules will reveal that the framers of the DSU never intended that the panels and the Appellate Body would be the sole mechanisms for dispute resolution within the WTO. The purpose of the DSU was to achieve the expeditious resolution of a dispute, agreeable to all parties. To that extent, diverse forms of alternative dispute resolution were not only provided for, but also encouraged as possibly being a more effective means of dispute settlement.

An examination of the cases which have been brought before the WTO, both settled and adjudicated, offers general observations regarding the WTO negotiations. In particular, three issues must be addressed. The first asks what role consultations play within the WTO dispute settlement system. The second issue examines why some disputes are resolved in consultation, while others proceed to the panel level. What

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<sup>6</sup> *General Agreement on Tariffs and Trade*, 30 October 1947, 61 Stat. A11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

factors, situations or political motivations allow some discussions to proceed smoothly, while other disputes create such an impasse that belligerents refuse to even attempt negotiations? The final section contrasts the effectiveness of consultations under the GATT and the WTO and, in particular, considers how the *binding* nature of impending panel decisions influences the parties during the consultation phase.

## II. CONSULTATIONS AND DISPUTE SETTLEMENT UNDER GATT

Dispute resolution under GATT suffered from a series of procedural failings. When a dispute arose, the Contracting Parties would first attempt to negotiate a settlement through bi-lateral consultations. If these talks were unsuccessful, the GATT Council would select a panel to hear the dispute, whose decision could be adopted by the Council.<sup>7</sup> However, the disputants were not forced to adhere to the panel's findings.<sup>8</sup> That is to say, any member, including the loser of the decision, could block the panel's recommendation from being adopted. Unfortunately, this blocking feature was frequently used by parties disenchanted with a panel's report and, by the 1960s, governments began to challenge the fairness of the GATT dispute settlement procedure:

GATT's...dispute settlement machinery does allow governments to slow things down, and sometimes to block them entirely. Present procedures are loose, and depend on co-operation.....The actual invocation of that [panel] process can often be delayed or deferred by asking for other kinds of proceedings first.....Finally, the panel's capacity to make complex or difficult legal interpretations has also traditionally required cooperation of the defendant government.<sup>9</sup>

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<sup>7</sup> GATT, *supra* note 3, art. XXII, art. XXIII. Art. XXIII allowed the matter to be referred to the Contracting Parties who could make recommendations or give a ruling on the matter to the contracting parties.

<sup>8</sup> William R. Spruance, "The World Trade Organisation and United States' Sovereignty: The Political and Procedural Realities of the System" (1998) 13 Am. Univ. Int'l Law Rev. 1225 at 1237-1238.

<sup>9</sup> Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy*, 2d ed. (New Hampshire: Butterworth, 1990) at 295.

A detailed analysis of the GATT's procedural failings is beyond the scope of this paper. What is important for this discussion, however, is that the GATT was intended as a mediatory forum. It was felt by many, especially the Europeans, that:

The goal of dispute resolution in GATT context should not be to create clear-cut binding rules... of law [but rather] to end the dispute...as soon as possible. Given the sovereign nature of the disputants, this goal is best accomplished through careful negotiations and appropriate compromises.<sup>10</sup>

Such compromises, if they can be achieved, are preferable "to litigation [because] agreed solutions are always the most durable and also produce the best long-term relations between members"<sup>11</sup> As it turned out, the blocking abilities of the parties meant that negotiations played an especially important role under the GATT. In many cases, the only way a resolution could be achieved was through diplomacy.

However, consultations could not solve every crisis, especially when the disputes became more complex and political. With the 1980s came a substantial increase in the number of cases being brought before the GATT. More and more of these involved highly sensitive issues and more ambitious legal complaints. This in turn led to the increased use of the parties' veto power to block adverse panel reports.<sup>12</sup>

Faced with this dilemma, the drafters of the Uruguay Round<sup>13</sup> realised that major procedural changes were required to enact an effective dispute settlement system. With regard to consultations, some limit was needed to prevent negotiations from proceeding indefinitely, without overly intruding upon the independent nature of such talks. In

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<sup>10</sup> Lisa Klainman, "Applying GATT Dispute Settlement Procedures to a Trade-in-Services Agreement", (1990) 11 U PA J Int'l. Bus. L. 657 as found in Michael K. Young, "Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats" (Summer, 1995) 29 No. 2 Int'l Lawyer 389 at 390.

<sup>11</sup> Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*. (New Hampshire: Buttersworth, 1993) at 280.

<sup>12</sup> *Ibid.* at 14, 290-1. Examples of blocked panel decisions during 1985-86: US lawsuits against the EC in *EC – Canned Fruit* and *EC – Citrus*, both "blocked by the EC, leading to the US retaliation in the *Citrus* case in 1985 and to the mobilisation for retaliation in *Canned Fruit* case in September averted by a settlement at the end of the year" at 201.

<sup>13</sup> The Uruguay Round was a series of economic negotiations completed in 1993. The talks produced numerous international agreements, including the DSU, which were signed by over 100 countries in 1994. For a detailed overview of the Uruguay Round, see The WTO Secretariat, *Guide to the Uruguay Round Agreements* (The Hague: Kluwer Law, 1999).

addition, it was necessary to grant more authority to the panels and eliminate the potential blocking effects that had undermined the Parties' confidence in the GATT's dispute resolution process. As will be seen, these changes to the panel stage would have important repercussions on the consultations phase.

### III. DSU RULES FOR CONSULTATIONS

At first glance, the new 'legalistic' provisions of the DSU may appear to be in marked contrast to the more diplomatic GATT dispute resolution rules. Indeed, the DSU allows for the automatic establishment of a panel upon request and the automatic adoption of a panel report. Whereas any party under GATT could block the adoption of a panel report single-handedly, the reverse holds true under the DSU rules. A panel report is adopted unless the DSB decides by consensus against the establishment of the report.<sup>14</sup> Equally innovative is the creation of a standing Appellate Body to review panel decisions on issues of law.<sup>15</sup> Once again, this Body's report is automatically adopted in the same manner as the panel decisions. If either the panel or the Appellate Body finds a measure to be inconsistent with the covered agreement, it recommends steps to bring the measure into conformity.<sup>16</sup> Finally, failure to comply with a decision within a reasonable period of time may result in the suspension of concessions.<sup>17</sup>

A further difference from the previous GATT dispute rules is the strict timeline imposed in almost every step of the dispute settlement system. Panel reports are adopted within sixty days of being circulated to the Members; Appellate Body reports are adopted within thirty days of being circulated to the Members.<sup>18</sup> Furthermore, the DSU stresses the importance of strict and expeditious compliance with these reports.

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<sup>14</sup> DSU, *supra* note 1, art. 16.4.

<sup>15</sup> *Ibid.* art. 17.1.

<sup>16</sup> *Ibid.* art. 19.1

<sup>17</sup> *Ibid.* art. 22.1, 22.2.

<sup>18</sup> If a case runs its full course to a first ruling, it should not normally take more than about one year – 15 months if the case is appealed. If the case is considered urgent, the case should take three months. *See* online: World Trade Organization – Disputes Menu <<http://www.wto.org/wto/about/dispute1.htm>>

Within thirty days of the adoption of a report, the Member concerned informs the DSB of its intentions in respect of the implementation of the rulings.<sup>19</sup> If the Member is unable to comply, it is given a “reasonable period of time” to do so, as determined by the procedures established in Article 21(3). These, and other provisions were designed to regulate and expedite the WTO’s dispute settlement system and to augment DSB control over the Members through a more adjudicative oriented dispute settlement system. Yet for all the legalistic control mechanisms inserted in the DSU by its drafters, it should not be overlooked that these controls were designed to supplement the diplomatic aspects of the GATT, which were reinforced in the DSU.

Although the DSU introduced major procedural changes to the GATT dispute settlement system, it is only a “comprehensive elaboration of the rules and procedures governing dispute resolution under the GATT, not a formal amendment to either Article XXII or XXIII.”<sup>20</sup> Article 3(1) of the DSU provides evidence that the Members of the WTO wish to continue utilising GATT’s conciliatory mechanisms:

Members affirm their adherence to the principles for the management of dispute heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

Thus, GATT’s focus on amicable dispute resolution, rather than on a formal dispute settlement system, is carried over to the DSU, which places great emphasis on the pre-panel consultation phase.<sup>21</sup> Irrespective of the strict legal rules contained in the DSU, this document’s primary purpose is to continue, where possible, the resolution of international trade disputes through conciliation rather than through quasi-judicial panel decisions. The fact is that litigation is not the only path to the termination of disputes, and many would argue that litigation ranks a poor second to an agreement reached through consultation:

It is an inescapable fact that issues that divide States are best settled by negotiation and agreement....The greater the direct involvement of the

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<sup>19</sup> DSU, *supra* note 1, art. 21.3.

<sup>20</sup> Young, *supra* note 10 at 397.

<sup>21</sup> Palitha T.B. Kohona, “Dispute Resolution under the World Trade Organisation: An Overview” (1994) 28:2 J. World T. 23 at 33.

opposing parties in the process of finding a solution to their differences, the greater the likelihood of a satisfactory and lasting outcome.<sup>22</sup>

Proof that the drafters of the DSU valued the above reasoning can be found within Article 3(7):

the aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreement is to be preferred.

In order to reach such an informal solution, the drafters of the DSU incorporated numerous diplomatic elements into the rules. To begin with, disputing parties can agree to resolve their dispute through good offices, conciliation or mediation.<sup>23</sup> This avenue was set up so as to be very convenient to employ; states may avail themselves of this provision at any time, even after the panel process has been initiated,<sup>24</sup> and the mediations may be terminated at any time.<sup>25</sup>

Should the Members choose to forgo mediation, they must still undergo consultations prior to triggering the legal elements (panels) of the system. Unlike GATT consultations, however, the DSU incorporates a strict timeline in order to prevent parties from obstructing the process with unresolvable or purposefully unproductive talks. When a request for consultations is made pursuant to a covered agreement, a reply to the request must be made within 10 days after the date of the request's receipt.<sup>26</sup> Thereafter, the Members enter into consultations in good faith within 30 days of the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If a Member does not adhere to these times, the complainant may proceed directly to request the establishment of a panel.<sup>27</sup> Should the consultations fail to settle a

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<sup>22</sup> Elihu Lauterpacht, "Aspects of the Administration of International Justice" 6 (1991) as quoted in William Davey & Amelia Porges, "Performance of the System I: Consultations & Deterrence: Comments" (Fall, 1998) 32 Int'l Lawyer 695 at 698.

<sup>23</sup> DSU, *supra* note 1, art. 5.1.

<sup>24</sup> Kohona, *supra* note 21 at 34. She notes that this flexibility in mediation demonstrates the emphasis of "obtaining a result that is mutually acceptable to the parties to the dispute rather than encouraging them to embark on the more formalised dispute settlement process."

<sup>25</sup> DSU, *supra* note 1, art. 5.3.

<sup>26</sup> *Ibid.* art. 4.4. All requests for consultations should be in writing, giving reasons, including identification of the measures at issue and an indication of the legal basis for the complaint.

<sup>27</sup> *Ibid.* art. 4.3.



dispute within 60 days of the date of the receipt of the request for consultations, the complainant may request the establishment of a panel.<sup>28</sup> The Article addressing consultations is rather detailed and even addresses ‘cases of urgency’ such as those concerning perishable goods, where consultations should begin within 10 days of the receipt of the request. In these situations, a settlement must be reached within 20 days or the complainant may proceed with the request for a panel.<sup>29</sup>

### 1. Consultation Rights & Duties

At first glance, it appears that the Member states have interpreted the DSU rules to mean that consultations are mandatory, and that no panel may be established without some form of negotiation. Closer inspection of the paragraphs of Article 4, however, reveals that there is no provision which specifically requires that a consultation *must* precede the establishment of a panel. Certainly, Article 4(2), “Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations....” and Article 4(4), citing that all requests for consultations shall be notified to the DSB in writing, imply that such actions are mandatory. More likely, Members realise the value of maintaining a link with the procedures developed under Articles XXII and XXIII of the GATT.<sup>30</sup>

Even if adherence to the consultation requirement is the norm, there have been a few cases under both the GATT and the WTO, where Members have absolutely refused to enter into dialogue prior to the establishment of a panel. Usually, these situations arise as a result of political matters. For example, “the EC refused to consult with Yugoslavia concerning EC trade sanctions in 1991.”<sup>31</sup> A more recent example, under the WTO, occurred in 1997 “when the US requested consultations with Ireland and the UK concerning customs reclassification of high-technology products, [and] both responded by referring to a letter from the EC stating that ‘consultations will not be entered into’.”<sup>32</sup>

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<sup>28</sup> *Ibid.* art. 4.7.

<sup>29</sup> *Ibid.* art. 4.8.

<sup>30</sup> Kohona, *supra* note 21 at 35.

<sup>31</sup> Davey & Porges, *supra* note 22 at 702.

<sup>32</sup> *Ibid.* The issue involved was the division of competencies between the Community and its member states in trade in goods.

Whether or not a Member has an 'absolute right to consult' was decided in *Brazil – Measures Affecting Desiccated Coconut*.<sup>33</sup> In that dispute, the Philippines claimed that the countervailing duty imposed by Brazil on the Philippines' exports of desiccated coconuts was inconsistent with WTO and GATT rules.<sup>34</sup> The Philippines requested consultations but Brazil refused, which prompted the panel to state that:

the Philippine's request concerns a matter which this Panel views with the utmost seriousness. Compliance with the fundamental obligation of WTO Members to enter into consultations where a request is made under the DSU is vital to the operation of the dispute settlement system. Article 4.2 of the DSU...[and DSU Article 4.6] make clear that Members' duty to consult is absolute and is not susceptible to the prior imposition of any terms and conditions by a Member.<sup>35</sup>

While it seems that Member states have a 'duty to consult', neither the DSU nor the panels/Appellate Body regulate the substantive content of those consultations. There is no indication as to how extensive the talks should be or what standard, if any, the dialogue must meet. The panel in *EC – Regime for the Importation, Sale and Distribution of Bananas* clarified this when the EC argued that the complainants did not "fulfil the minimum consultation requirement of affording a reasonable possibility for arriving at mutually satisfactory solution"<sup>36</sup> The panel rejected the EC's line of reasoning, citing that:

[c]onsultations are.. a matter reserved for the parties. The DSB is not involved; no panel is involved; and the consultations are held in the absence of the Secretariat. In these circumstances, we are not in a position to evaluate the consultation process...it is our view that the function of a panel is only to ascertain that consultations, if required, were in fact held or at least requested.<sup>37</sup>

<sup>33</sup> *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, 287 (Oct. 17, 1996).

<sup>34</sup> *Overview of the State-of-play of WTO Disputes*, online: World Trade Organisation <<http://www.wto.org/wto/dispute/dispute.htm>> (last modified: 26 February 1999).

<sup>35</sup> *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, 287 (Oct. 17, 1996) as quoted in Davey & Porges, *supra* note 22 at 702.

<sup>36</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Panel, WT/DS27/US (May 22, 1997) as quoted in Terence P. Stewart & Mara M. Burr, "The WTO's First Two and a Half Years of Dispute Resolution" (Summer, 1998) 23 North Carolina Journal of International Law and Commercial Reg. 481 at 608.

<sup>37</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, (May 22, 1997) as quoted in Davey & Porges, *supra* note 22 at 704.

This writer agrees completely with the *Bananas* panel in that consultations should be a dialogue *sans* interference from any outside parties and unfettered by institutional requirements.<sup>38</sup> The entire DSU settlement process has become quite regulated, in comparison with its GATT predecessor. The purpose of consultations is for the Members to work out their differences without rules or restrictions. It is an opportunity to reach a solution in a manner suitable for that particular issue and with regards to those particular parties. DSB interference at the consultation stage would only mar the informal, diplomatic process that is so critical in reaching a successful negotiated settlement.

Despite the improvements engineered into Article 4, WTO consultations still suffer from certain drawbacks. For instance, what can be done if a respondent wishes to conduct unhelpful negotiations? As nothing regarding Member etiquette is contained within the paragraphs of Article 4, there is little to prevent a Member from stonewalling during negotiations.<sup>39</sup> The Appellate Body has provided some direction in this matter when it declared that parties are expected to act in good faith:

All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations<sup>40</sup>

Unfortunately, as the Appellate Body lacks the capacity to ‘make law’, the above decree remains non-binding upon the Member states.

Another weakness in the system rests with Article 4(11). This provision, regarding third party Members joining consultations, has

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<sup>38</sup> Unless, of course, the Members agree to utilise the good offices of the WTO under Article 5.

<sup>39</sup> See Davey & Porges, *supra* note 22 at 706-7. In situations where a respondent is unwilling to answer a question in consultation, the complainant may seek additional fact-finding from the panel. Gary Horlick, in a question & answer period, stated that “the rule under the DSU is that panels should look only to their terms of reference in deciding which issues to address, and should not look to what the parties may or may not have discussed in consultations.” He added that “if a party wishes to stonewall, that’s its right [but] it risks having the complaining party ask for very broad terms of reference [from the panel].”

<sup>40</sup> *India- Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 94 (Dec. 19, 1997) at WTO website, as quoted in Davey & Porges, *supra* note 22 at 705.

been incorporated nearly unchanged from Article XXII of the GATT. Joint consultations may be useful but often complicate matters, as subsequent Members raise additional issues. The result is that settlements become harder to achieve. Paragraph 11 also allows the respondent to decide whether the prospective joiner's claim of substantial interest is well founded. This means that respondents may 'stack the talks' by allowing "Members whose interests are aligned with"<sup>41</sup> it to join, while blocking those Members whose inclusion may prove detrimental to their cause. However, these issues are not that common. More than ever, due to the binding nature of the subsequent panel decisions, Members usually see the consultation phase as an opportunity to further their policies, not as an impediment to those interests.

#### IV. THE ROLE OF CONSULTATIONS

Having clarified the scope and procedures for consultations under the WTO, the next step is to determine what role consultations play in the dispute settlement process. To begin with, the pre-panel consultations give "notice to defendants [of a grievance and provide the parties with] a chance to settle in the manner that maximizes party control."<sup>42</sup> Also, even if the parties had previously engaged in informal consultations, a formal request to the DSB for consultations demonstrates that a Member is serious about resolving the dispute. Furthermore, consultations allow the parties to put "forward facts...to show that circumstances [in the defendant country] are not unlike circumstances in the complaining country."<sup>43</sup> Referring to the *Canada – Certain Measures Concerning Periodicals*<sup>44</sup> case, one international trade lawyer noted that "often a real exchange of factual data can be useful...the exporting member will know how imports are treated, but may not know how domestic interests are treated."<sup>45</sup> However the

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<sup>41</sup> *Ibid.* at 697.

<sup>42</sup> *Ibid.* at 703.

<sup>43</sup> *Ibid.* at 707.

<sup>44</sup> *Canada – Certain Measures Concerning Periodicals*, WT/DS31 (July 30, 1997).

<sup>45</sup> Gary Horlick, "The Consultation Phase of WTO Dispute Resolution: A Private Practitioner's View" (Fall, 1998) 32 *Int'l Lawyer* 685 at 692.

consultations do more than simply allow the Members to gather information and gain an understanding of the larger picture. If the defendant can produce viable legal arguments, their ability to prevent a panel request improves considerably.<sup>46</sup>

It should also be noted that consultations may continue even after a panel has been requested. Nothing in the DSU limits the belligerent parties from discussing matters after the 60 days have elapsed. This means that a settlement may be reached at any time, even after a panel or Appellate Body has reached a decision. In *European Communities – Trade Description of Scallops*, the parties requested the panel to postpone the issuance of the Final Report numerous times. Finally, on May 10, 1996, the parties requested the panel to suspend the panel proceedings in accordance with Article 12(12) of the DSU as they were discussing the terms of a mutually agreed solution.<sup>47</sup>

Consultations are not merely helpful in reaching a settlement. In cases where no agreement can be reached, the talks may help clarify:

uncertainties about the scope and the nature of the measures at issue, eliminating fruitless or invalid claims. Consultations are an important means of focusing the dispute and setting up the case to facilitate the panel's work, similar to the role of pre-trial conferences between parties to domestic litigation.<sup>48</sup>

If you ask an international trade lawyer, he or she will likely inform you that consultations are now used extensively for providing Members with this 'discovery process'. The negotiations allow a party to deduce the other's strategy and to determine the strengths and weakness of the opponent's case. To trade lawyers, it is predominantly an opportunity to acquire relevant information and documents that will be used to further their cause at the panel stage.<sup>49</sup> The above demonstrates that WTO consultations may play a substantial role in the legal process of litigation, in addition to providing a forum for the more political process of dispute resolution.

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<sup>46</sup> *Ibid.*

<sup>47</sup> *European Communities – Trade Description of Scallops*, Report of the Panel, WT/DS7/R (Aug. 5, 1996), at 1996 WL 738813, (W.T.O.).

<sup>48</sup> Davey & Porges, *supra* note 22 at 703.

<sup>49</sup> A telephone interview with an international trade lawyer at the Canadian Department of Foreign Affairs and International Trade (DFAIT), who desired to remain anonymous (11 March 1999).

## V. FACTORS INFLUENCING CONSULTATIONS

Why is it that some disputes are resolved quickly, in the initial consulting stages while other disputes are seemingly irreconcilable, thereby necessitating advancement to the panel stage? Cases vary considerably, although there are characteristics common to certain disputes which reduce the possibility of a reaching a mutual solution under the consultation phase.

To begin with, sensitive political issues may cause a state to forge ahead and seek redress with a panel. Even if a Member knows that the outcome would not be in its favour, the government may have to show that it is "taking every possible step" to protect its interests.<sup>50</sup> For example, in *Canada – Periodicals*,<sup>51</sup> one could reasonably infer that Ottawa knew that its policies, especially the punitive 80% excise tax, were in contravention of its WTO obligations. Regardless, Canada was reluctant to give in to US demands as the protection of Canadian culture and the Canadian periodical industry remain a top priority.<sup>52</sup> In fact, it seems that Ottawa often ignores the advice of its trade lawyers, "in favour of political considerations when Canada decides what cases to take before international bodies."<sup>53</sup> For example, on July 10, 1998, having failed to produce a settlement in negotiations, Canada requested a panel to inquire into Brazil's alleged export subsidy of its aircraft industry.<sup>54</sup> "In response, Brazil...challenged a range of Canadian programs," financed by Industry Canada.<sup>55</sup> Apparently, the subsequent

<sup>50</sup> Horlick, *supra* note 45 at 691. He cites *EU-Beef Hormones*, *US-Costa Rica Textiles*, and possibly *Brazil-Desiccated Coconuts* as cases where the losing party knew or should have known at the outset that it had little or no chance of winning.

<sup>51</sup> *Canada – Periodicals*, *supra* note 44.

<sup>52</sup> G. Gherson, Political Editor of *The National Post*, "Magazine War: 'US rejects Canadian line'" *The National Post* (5 April 1999), online: *The National Post* <<http://www.nationalpost.com/home.asp?f=990405/2446121>> (date accessed: 6 April 1999). Gherson explains that only recently have Canadian officials considered seriously compromising with the US: "to avert a nasty trade war with its largest trading partner, the Chretien government has agreed to discuss possible compromises measures that would meet Canadian cultural policy objectives while satisfying the US".

<sup>53</sup> I. Jack, "Bureaucrats, lawyers feel passed over in WTO deals" *The National Post* (30 March 1999) C8.

<sup>54</sup> H. Scofield, "Canada breaks off talks with Brazil" *The Globe and Mail* (10 July 1998) S11.

<sup>55</sup> Canadian Department of Foreign Affairs and International Trade, *Canada/Brazil WTO Panels – Aircraft, Overview*. 1998, online: Canadian Department of Foreign Affairs and

WTO ruling, which impacted negatively upon Canadian industry, was quite foreseeable and Ottawa was duly forewarned. Why then did Canada proceed with its action? According to one senior trade law official, "Ottawa often starts cases simply to placate a powerful stakeholder."<sup>56</sup> Of course, Canadian trade officials are not alone in their frustration. Every Member state will have political interests or an agenda which prevents it from acting in the most reasonable manner at all times.

Another difficulty with mutually agreed upon solutions is that some lead to allegations of inadequate implementation.<sup>57</sup> When a settlement is reached as a result of consultations, the Members detach themselves from the formal DSU mechanism. If a Member subsequently reneges on the agreement, the complainant must begin the entire dispute resolution process anew; in most instances, no fewer than 90 days will pass before the complainant may request a panel! This potential delay could act as an incentive in seeking a binding panel report, as the DSB under Article 21 will be sure to monitor the respondent's compliance.<sup>58</sup>

Finally, there are disputes which simply cannot be resolved through consultations, no matter how extensive the talks. In *United States – Restriction on Imports of Cotton and Man-Made Fibre Underwear*, Costa Rica complained that US restrictions on textile imports from Costa Rica were in violation of the Agreement on Textiles and Clothing. Consultations were held under that provision which did not result in a settlement. Again, when Costa Rica subsequently requested additional consultations with the US under Article 4 of the DSU, no mutual solution was reached and the matter had to go to a panel.<sup>59</sup> An even better example of a seemingly unresolvable issue is the *EC – Bananas*<sup>60</sup> dispute. Over the years, a multitude of negotiations have all failed to resolve the contentious issues. Even the intercession of the

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International Trade <[http://www.dfait-maeci.gc.ca/tna-nac/air\\_overview-e.asp](http://www.dfait-maeci.gc.ca/tna-nac/air_overview-e.asp)> (date accessed: 20 March 1999).

<sup>56</sup> Jack, *supra* note 53 at C8.

<sup>57</sup> Horlick, *supra* note 45 at 688. For example see *Philippines – Pork* WT/DS102/1 (Oct. 7 1997).

<sup>58</sup> *Ibid.*

<sup>59</sup> *United States – Restriction on Imports of Cotton and Man-Made Fibre Underwear*, Report of the Panel, WT/DS24 (8 November 1996), at 1996 WL 738823 (W.T.O.).

<sup>60</sup> *EC – Bananas*, *supra* note 36.

WTO Director-General in January 1999, failed to find a lasting compromise, although it did forestall US actions for a while.<sup>61</sup>

Conversely, there are a number of reasons why parties may deem it in their best interest to avoid proceeding to the panel stage. The most obvious factor is the bitter reality of having an independent arbitrator, such as the WTO, direct a sovereign state's actions. This is especially difficult in situations where the level of trade is considerable or if political issues are involved.<sup>62</sup> However, it seems that this factor is not very determinative. Generally, countries do not resent having to go to a panel, and even respondents who lose a decision seem to stoically accept the report.<sup>63</sup>

Although it was discussed above that one boon to the panel system was its surveillance and compliance aspect, as a general rule, it may be better not to force implementation. As most decisions are appealed, the entire process may take up to 15 months or longer to resolve, as was evident in the ongoing *EC- Bananas*<sup>64</sup> dispute. Sometimes, it is better to take the risk of non-implementation that comes with a settlement, in order to gain relatively quick access to the other country's markets.<sup>65</sup>

Countries may even be influenced in their decision by the nature of the adjudicators. At times, the neutrality of panelists and Appellate Body members may be called into question. Although "Panelists...are forbidden from sitting on Panels where their governments are a party to the proceeding, Appellate Body members are under no such prohibition."<sup>66</sup> Also, even though a panellist's state cannot be a party to

<sup>61</sup> See "EC, US Accept Ruggiero Compromise on Banana Dispute", online: World Trade Organisation <<http://www.wto.org/wto/new/dsweb.htm>> (date accessed: 10 March 1999).

<sup>62</sup> Stewart & Burr, *supra* note 36 at 514-516. These authors note two high profile US cases where agreements were reached that either ended the dispute or postponed action by the panel. First, at 515, they discuss the US- automobile dispute with Japan where a bilateral agreement was reached before the retaliatory tariffs were implemented. Then, at 516, they describe the politically sensitive EC case over the implementation of the Cuban *Liberty and Democratic Solidarity Act*.

<sup>63</sup> A telephone interview with a DFAIT trade lawyer, *supra* note 49, who indicated that no one resents having to go to a panel, and that Canada has not had a problem with even negative WTO decisions.

<sup>64</sup> *EC- Bananas*, *supra* note 36. In this case, the panel was established on 8 May 1996. The report of the Appellate Body was not adopted until 25 September 1997. In addition, there was further contention regarding the reasonable implementation time period that continued into 1999.

<sup>65</sup> *Ibid.*

<sup>66</sup> Stewart & Burr, *supra* note 36 at 491.



the dispute, that state may still have an interest in the outcome of the proceeding.

Any analysis attempting to explore the reason why some cases are settled while others go forward must include some discussion of the nature of the participants. Parties to the WTO/GATT are states with a variety of idiosyncratic abilities, resources and interests which determine how each state will react to a specific situation. Some countries are naturally more conciliatory and generally prefer to resolve a dispute by diplomatic means rather than through a (semi) legal process such as a panel. Other parties are reluctant to compromise, which tends to inhibit successful settlements. Robert Hudec has compiled extensive research on certain GATT Parties regarding their tendencies towards dispute resolution., and while the data pertains to GATT disputes, his observations are still relevant to a contemporaneous WTO study.

To begin with, it appears that "Japan had by far the highest percentage of cases settled or conceded (65 percent), more than double that of any other participant."<sup>67</sup> Although Japan is "an economic giant,...its traditional isolation and its relatively closed society and economy [have led Japan] to avoid confrontational extremes in litigation and to settle complaints against it wherever possible."<sup>68</sup> Canada, on the other hand, had

the lowest settlement rate and far and away the highest percentage of cases that went to a legal ruling, 73 percent for the full 42 year period, and 64 percent for the 1980s alone. In sum, Canada presents the profile of a smaller country that prefers to wage open combat over legal complaints against it. Being relatively small, most of the time it is forced to resist all the way to a legal ruling.<sup>69</sup>

Similarly, the United States "seems to prefer resistance to settlement, but its power makes its resistance considerably more effective."<sup>70</sup> Other noteworthy points include the fact that developing countries agreed to settle 41 percent of complaints against them whereas developed country defendants settled only 27 percent.<sup>71</sup>

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<sup>67</sup> Hudec, *supra* note 11 at 301.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.* at 301-302.

<sup>70</sup> *Ibid.* at 302-3. Hudec explains that instead of litigation nearly half of the complaints against the US were withdrawn or abandoned: 44% overall and 53% in the more rough-and-tumble 1980s.

<sup>71</sup> *Ibid.* at 303.

This data suggests that in GATT, where many disputes were settled diplomatically, and where no binding panel scheme existed, the economic power of a Contracting Party was an important, if not critical, factor in determining the outcome of a dispute. Indeed, Hudec's analysis shows that developing countries have tended to grant more favourable settlements: "developing...countries have granted full satisfaction of the claim in 82 percent [while] Japan and the EC...have granted full satisfaction in only 46 percent and 54 percent of their settlements, respectively."<sup>72</sup> He concludes that the GATT dispute settlement system was "more responsive to the interest of the strong than to the interests of the weak."<sup>73</sup> The question remains whether the new DSU rules have altered this state of affairs.

## **VI. CONSULTATIONS UNDER A BINDING DISPUTE SETTLEMENT SYSTEM**

This last section examines whether consultations under the DSU have been more effective in settling disputes than consultations under the GATT dispute resolution process. Due to the relatively recent implementation of the DSU, this is a difficult question to answer. One may argue, however, that the WTO Members continue to display confidence in the new dispute system, including the consultation phase. States are bringing their disputes under the DSU in increasing numbers. As of February 26, 1999, there have been 163 consultation requests under the DSU, involving 125 Distinct Matters (cases). Out of these figures, 19 (15 percent of the cases) Appellate and panel Reports have been adopted, while 30 cases (24%) have been settled or are inactive.<sup>74</sup> This figure demonstrates that, notwithstanding the new legalistic provisions of the DSU, the WTO Members continue to rely heavily upon diplomatic consultations in order to settle their disputes.

In comparison, GATT experienced 207 requests from 1948 to 1989 for consultations under Art XXIII. Of this total, 64 (31%) were settled

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<sup>72</sup> *Ibid.* at 307.

<sup>73</sup> *Ibid.* at 353.

<sup>74</sup> See *Overview*, *supra* note 34.

prior to formal ruling.<sup>75</sup> This 7 percent difference between the GATT and WTO, while slight, may seem to suggest that more countries are willing to bring their disputes to the WTO but are less willing to settle.<sup>76</sup> One explanation for the discrepancy is that with a binding dispute mechanism, a more judicial panel, and a standing Appellate Body, complainants are bringing forward cases which were once thought to be too complex or sensitive; they would have been blocked under the GATT rules.<sup>77</sup> Such complex cases are not amenable to resolution through negotiation. "Indeed, countries such as Venezuela, which had previously filed cases under the GATT have now refiled under the WTO because of the various benefits offered" in the new system.<sup>78</sup>

Does this mean that consultations under the WTO will be relegated to an insignificant procedural waystop on the 'road to the panels'? Certainly there are those who will argue that the DSU consultation phase is nothing more than a fact-finding, legal 'discovery' process. One DFAIT trade lawyer described it as a "fishing expedition" where the legal officials "clamp down on incautious commentary and attempt to get as much out of the other side as they can."<sup>79</sup> This kind of approach is disturbing in that it may seriously undermine the importance of negotiations to WTO dispute resolution. Fortunately, enough government officials (and even some international trade lawyers) realise that one may still accrue otherwise unattainable political and economic gains from successful consultations.

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<sup>75</sup> Hudec, *supra* note 11 at 277. 88 (43%) cases were subject of formal rulings, 64 (31%) settled prior to formal ruling, and 55 (27%) were withdrawn or abandoned.

<sup>76</sup> In a telephone interview, this writer was warned by a DFAIT trade negotiator, who desired to remain anonymous, to be careful in using statistical analysis in formulating a general opinion. The negotiator indicated that the cases are very diverse and that they are affected by numerous factors that may lead to inaccurate observations (17 March 1999).

<sup>77</sup> Hudec, *supra* note 11 at 14 and 290. As noted above, in the late 1980s, more and more difficult legal issues were being brought before the GATT. These highly sensitive issues resulted in an increasing number of failures as governments used their veto power to block the creation of panels.

<sup>78</sup> G. D. Aldonas, "The World Trade Organisation: Revolution in International Trade Dispute Settlements" (1995) 50 *Dispute Resolution J.* 73 at 79. Because of the GATT consensus requirements, "panels often found themselves writing their reports to ensure [that] they could gain a consensus among the GATT membership"; without the blocking capability, panels may now pass more neutral decisions.

<sup>79</sup> A telephone interview with a DFAIT trade lawyer, *supra* note 49 (11 March 1999).

With regard to the comparisons with the GATT statistics, it should be noted that the 31% GATT settlement rate applied to the entire history of the Contract. The statistics include earlier periods, in the 1950s, where conciliation among the relative small number of Contracting Parties meant that settlements were more common. In the 1980s, the percentage of cases settled or conceded in GATT declined to 24% (28 out of 155 complaints) as disputes became more complicated and politically sensitive.<sup>80</sup> The figure matches exactly the WTO percentage of settled disputes; this is surprising for an organisation which is often considered more adjudicative than its GATT predecessor.

It is true that many WTO members argued strongly in favour of a legalistic dispute mechanism within the DSU. This does not mean, however, that these countries are unwilling to seriously consider diplomatic channels to address their problems. Evidence of the Members' reliance upon negotiation to sort out their difficulties can be found within the policy of perhaps the WTO's most active member (and complainant). The United States Government, one of the strongest proponents of a legalistic scheme, has summarised its position on the WTO consultations. "The new dispute settlement rules often make it possible for us to enforce WTO agreements without ever having to reach a panel decision."<sup>81</sup> The United States Trade Representative has also stated that "the principal strength of an international organization like the WTO is the opportunity to focus and place emphasis on resolving differences before they rise to the level of formal disputes."<sup>82</sup> The European view is akin to that of the United States. Sir Leon Brittan summarised the European Union's view by commenting that "the binding nature of the DSU encourages the settlement of dispute through consultations."<sup>83</sup>

It is evident that Members are as enthusiastic about resolving their differences in negotiations today, as they were under GATT. Under the

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<sup>80</sup> Hudec, *supra* note 11 at 291.

<sup>81</sup> Office of the United States Trade Representative, *Report on Trade Expansion Priorities Pursuant to Executive Order 12901 (Super 301)*, 62 Fed. Reg. 52,604-611 (1997) as found in Horlick, *supra* note 45 at 685.

<sup>82</sup> Office of the United States Trade Representative, *Report on WTO Implementation from the President's Advisory Committee for Trade Policy and Negotiations: WTO Implementation Report*, 11 March 1996, online: United States Trade Representative <<http://www.ustr.gov/reports/wto/dispute.html>> (date accessed: 26 March 1999).

<sup>83</sup> Sir Leon Brittan as quoted in Horlick, *supra* note 45 at 686.

DSU, Mr. Hudec's trend seems to remain fairly consistent, although it is still too early to comment with certainty. Generally, the majority of settlements still occur when the Members are of similar economic strength<sup>84</sup> or where the complainant is more powerful economically than the respondent.<sup>85</sup> Individually, Japan has been involved in three settlements in which it was the respondent.<sup>86</sup> Yet, Japan has become less conciliatory recently, and is taking a harder line in WTO consultations, and negotiations in general. According to one trade negotiator, "Japan has become more pragmatic" and has reassessed its strategy.<sup>87</sup> Canada, true to its combative nature, has not settled any of the cases instigated against it, although as a complainant, it has settled in a few cases. The US has continued to resolve a large number of cases in consultation, as a complainant. Surprisingly, the US has also settled a significant number of disputes as a respondent!<sup>88</sup> The Members, it seems, have not completely forgotten that mutually agreed upon solutions are more productive in the long run and that trade disputes can be settled on a win-win basis.

Perhaps the greatest rationale for seeking a negotiated solution under the DSU involves the relationship between the consultation and panel stages. An argument can be made that the binding nature of the panel process acts as a deterrent to proceeding past the consultation stage and therefore, works to induce settlement by negotiation. Although a panel merely ensures that the Members comply with their GATT obligations, the automatic adoption of a potentially harsh report which *must* be complied with in a set period of time<sup>89</sup> is a powerful

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<sup>84</sup> See *Overview*, *supra* note 34: for example, *Venezuela – Anti-Dumping*, complaint by Mexico (DS23), *Malaysia – Polyethylene*, complaint by Singapore (DS1).

<sup>85</sup> *Ibid.* For example, *Korea – Laws, Regulations and Practices in the Telecommunications Sector*, complaint by the European Communities (DS40), *Pakistan – Pharmaceutical Products*, complaint by the US (DS36).

<sup>86</sup> *Ibid.* See *Japan, telecom* (DS15) *Japan, sound recordings* (DS28, DS42) *Japan, procurement* (DS73) overview.

<sup>87</sup> A telephone interview with a DFAIT trade negotiator, *supra* note 76 (17 March 1999).

<sup>88</sup> US, wool coats (DS32), US, anti-dumping duties (CTVs) (DS89), US, automobiles (DS6), US, Cuba (Helms Burton) Act (DS38) US, hormones retaliation (DS39), US-Measures Affecting Textiles and Apparel Products, complaint by the European Communities (DS85), US-Anti-Dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico, complaint by Mexico (DS49)

<sup>89</sup> DSU, *supra* note 1, art. 21.

incentive to resolve a dispute in a more conciliatory manner. For example, a complainant may negotiate with a respondent in an informal non-WTO setting, to no effect.<sup>90</sup> The complainant may then find that same respondent more amenable to a compromise after the complainant initiates the dispute settlement procedure under the DSU. The threat of a binding panel report, which the respondent will not be able to block unilaterally, will certainly cause a respondent to reconsider the situation.<sup>91</sup> Therefore, commencing the consultation phase of the DSU shows that the complainant is serious, and determined to end the dilemma. It also means that negative repercussions for the respondent may follow, should a resolution not be reached.<sup>92</sup>

A good example of this deterrent effect is the *United States – Automobiles* dispute.<sup>93</sup> The case is also noteworthy as an example of a complainant in a favourable position seeking to settle. In response to the US declaration that it would impose 100 percent tariffs on Japanese luxury cars on June 28, 1995, Japan requested consultations under Article 4 of the DSU, so that talks could begin no later than June 17. If Japan had initiated actions under Art. XXIII of the GATT, the lack of a strict timeline would have meant that the sanctions would have been in place by the time the GATT settlement mechanisms would begin.<sup>94</sup> Although it was accepted that Japan had a strong case,<sup>95</sup> the Japanese

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<sup>90</sup> A telephone interview with a DFAIT trade negotiator, *supra* note 76, who indicated that settlements that are capable of being resolved are often settled *prior* to the formal consultation phase; thus, those disputes that proceed to the WTO consultation phase are usually quite difficult to resolve (17 March 1999).

<sup>91</sup> A telephone interview with a second DFAIT trade lawyer, who wished to remain anonymous. The lawyer conceded that although not much has changed in consultations (under the DSU), there 'may' be more pressure to settle, as no Member can block the reports (23 March 1999).

<sup>92</sup> *Ibid.* As defendants predominantly lose in panel disputes, it is in their best interest to settle. In settlements, one, at least, has the opportunity to acquire or retain some benefits.

<sup>93</sup> *United States – Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade Act of 1974*, WT/DS6, settled on 19 July 1995.

<sup>94</sup> W.E. Scanlan, "A Test Case for the New World Trade Organisation's Dispute Settlement Understanding: The Japan-United States Auto Parts Dispute" (1997) 45 *Univ. of Kansas Law Rev.* 591 at 607-8.

<sup>95</sup> See World Trade Organisation (WTO) Dispute Settlement Review Commission Act: Hearings on S. 16 Before the Senate Comm. On Fin., 104<sup>th</sup> Cong. 21 (1995) (statement of Alan F. Holmer, former Deputy U.S. Trade Representative) (commenting that "Japan has a darn good case in the WTO that [the United States has] violated [the trade] agreement") as found in *ibid.* at 609.

chose to pursue a negotiated settlement with the Americans, which was reached the day before the tariffs were to go into effect. Pursuing its case with a DSB panel beyond the tariff deadline would have resulted in a \$5.9 billion loss to Japan's automobile manufacturers.<sup>96</sup> This, and the possibility of a trade war with the US, prompted a complainant in a superior position to concede to a settlement. Meanwhile, an argument may be made that the US chose to pursue its grievances outside of the WTO, in the form of the unilateral tariffs, as it did not feel that it had a strong case.<sup>97</sup> Similarly, the US may have been apprehensive of a neutral panel ruling against its sanctions. Washington would naturally prefer to dictate its own trade policies, and the government probably felt that its interests would be best served in a settlement with a traditionally conciliatory country.

## VII. CONCLUSION

Many predictions were made in the mid-1990s that the WTO would become an adjudicative body where 'lawyers would triumph over diplomats'.<sup>98</sup> Indeed, the panels and the Appellate Body are presiding over an increasing number of disputes, and the consultations are being used extensively as legalistic fact finding missions. However, this is not to say that Members have forsaken the use of consultations to remedy their dilemmas. Even those complainants whose goal is to obtain a favourable panel decision, will attempt to supplement their legal proceedings with a negotiation strategy. In other words, consultations will continue to remain an active and vital element within the WTO dispute settlement system.

Statistically the number of disputes settled under the DSU and the GATT are relatively equal, notwithstanding that the cases are more

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<sup>96</sup> Scanlan, *supra* note 94 at 609.

<sup>97</sup> See M. Felsenthal, "U.S. Threatens Duties on Luxury Cars Worth \$5.9 Billion in Japan 301 Dispute" 12 Int'l Trade Rep. (BNA) 848, at 849 (quoting Japanese Automobile Manufacturer's Association Director, William Duncan, who commented that "the [U.S.] administration has said that it will ask the WTO to review Japan's auto markets, but can't wait for a verdict before imposing a sentence... This can only mean that they have little faith in their position.") as found in Scanlan, *supra* note 94 at 610.

<sup>98</sup> See Young, *supra* note 10.

complex and politically sensitive than ever before. Part of the reason for the continued use of negotiated settlements is that certain governments and situations are simply more amenable to compromise. In other cases, the parties' interests are such that a quick resolution is sought; under these circumstances, waiting on months of appeals is not a viable option. Finally, the binding nature of the DSU discourages parties with a weak case from proceeding past the negotiation phase. Through dialogue, a state can usually retain some benefits which would otherwise have been lost to a panel report which can no longer be blocked. In the end, it is ironic that one of the rules which fashioned the WTO into such a legalistic entity ensures that this organization will remain a forum of consultation.